IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

NICHOLAS L. ETTEN,

Petitioner,

vs.

WALTER L. KAUFFMAN II and LOVELL MANUFACTURING COMPANY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the United States:

Your petitioner, Nicholas L. Etten, Plaintiff-Appellee below in long pending litigation[1] and the prevailing party

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[1] This litigation resulted from Patent Office interference proceedings commenced February 15, 1938 and was taken to the District Court on October 22, 1943, and involves still pending application Serial No. 167,775 of plaintiff, filed in the Patent Office on October 7, 1937 for a reissue of Etten Patent No. 2,054,970 (which expires on September 22, 1953), and also involves still pending Etten application Serial No. 38,932, filed November 3, 1935. (See 83 Fed. Sup. 178)

in the Federal District Court in a suit under Section 4915 R.S. (35 U.S.C.A. Sec. 63) to obtain letters patent, a suit under Section 4918 R.S. (35 U.S.C.A. Sec. 66) to declare the defendant company's Jantz patent invalid, and in a **suit for damages, fraud and conspiracy in the procurement of the Jantz patent,** respectfully prays a writ of certiorari to the United States Court of Appeals for the Third Circuit to review the judgment entered by that Court on September 29, 1950 (with costs against your petitioner), vacating, in its entirety, the March 8, 1950 judgment of the District Court in favor of plaintiff on all counts[2].

The Court of Appeals in its opinion of September 29, 1950 (Printed Appeal Record p. 219) said:

> "It must be conceded that the court below had jurisdiction of the parties and during one period, *viz.*, from October 22, 1943 to March 1, 1944 may have had jurisdiction of the subject matter of the action based on R.S. Section 4915."

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[2] The first time, the Court of Appeals dismissed the appeal because of alleged deficiencies in the judgment under Rule 54(b), and the second time the Court, while conceding in its Opinion that the lower Court had jurisdiction at the time the suit was filed. entered a judgment completely vacating the lower Court's judgment, with costs against your petitioner, and remanding the case, with instructions to the lower Court to receive additional evidence on the question of transfer of title under Rule 25(c), this latter and Final Judgment being tantamount to holding that the lower Court, on the basis of the evidence before it, did not have jurisdiction to render the judgment that it did. (Appeal Record p. 169-171 and 210-222 inc. Also 179 Fed. (2nd) 302 and 87 U.S.P.Q. 35)

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED.

1. This suit was originally filed on October 22, 1943 following adverse decisions against your petitioner, Nicholas L. Etten, in Patent Office Interference No. 75,433, declared on February 15, 1938 between Etten's application Serial No. 38,932 and defendants' Gustave Jantz application Serial No. 749,977 (which issued into Patent No. 2,406,951 on September 3, 1946) and Interference No. 76,987, declared April 25, 1939 between Etten's application Serial No. 167,775 for reissue of Etten's patent No. 2,054,970, issued September 22, 1936 from an application filed December 23, 1932, and the same Jantz application Serial No. 749,977.

2. The original complaint herein included a count under Section 4915 R.S. (35 U.S.C.A., Section 63)[3] to obtain letters patent on the two aforesaid Etten applications and a cause of action for damages to plaintiff, your petitioner here, alleging defendants "agreed and conspired together to, and did, individually and together, conceal material evidence in the control and possession of each and all of them, and agreed and conspired together to, and did, individually and together, put into evidence in said interferences false and untrue testimony as to material facts and make misrepresentations of material facts which were false and untrue; that such false and untrue testimony and misrepresentations and concealments were known by the said Kauffman, said Lovell Manufacturing Company and said Jantz to be untrue and were made with the intention that they be relied upon by the plaintiff and by the United States Commis-

[3] Defendants below in their answer to Paragraph 12 of the Complaint admit that no appeal was taken to the Court of Customs and Patent Appeals in Patent Office Interferences Nos. 75,433 and 76,987. (Pleadings Record p. 54a)

sioner of Patents, the Examiner of Interferences, and the Board of Appeals of the United States Patent Office, and these parties did rely thereon, which concealments, testimony and misrepresentations caused the Examiner of Interferences and the Board of Appeals to reach decisions in said interferences contrary to the true facts and the law of the United States, which decisions would deprive the plaintiff of patents for the aforesaid claims; that the fraudulent conduct hereinabove complained of comprised and included giving and producing false and untrue testimony with respect to alleged invention and development of the alleged invention disclosed and claimed by Jantz, said testimony and evidence falsely indicating dates of invention and development long prior to the actual dates of the activities relied upon by Jantz in said interferences." (Pleadings Record pp. 6a-7a).

3. Before answering the complaint, on February 20, 1945, defendants brought a number of motions to dismiss and to strike portions of the complaint and particularly those having to do with the maintenance of the suit for fraud and conspiracy, which motions, after extensive arguments and hearing in open Court, were denied by Judge Schoonmaker, who wrote an opinion thereon dated January 24, 1945.[4]

4. Prior to the trial of the case on October 21, 1946, your petitioner took extensive depositions, including discovery depositions of the officers of the defendant company and of the defendant Kauffman, as a result of which a vast number of pertinent documents, papers and drawings were found in the files of the attorneys for the defendants, all of which were later offered in evidence during the trial.

5. Just prior to the trial, a pre-trial conference was had with the District Judge, at which the issues were discussed

[4] (4 F.R.D. 233. Also printed in accompanying volume of opinions and judgments.) See p. 1a.

and plaintiff presented a motion to amend his complaint to include a suit under Section 4918 R.S. (35 U.S.C.A. 66), which was filed October 15, 1946, promptly after the issuance of the defendants' Jantz application in suit on September 3, 1946, as Jantz patent No. 2,406,951.

The lower Court at that time indicated it would reserve decision on that motion of plaintiff, and that the parties would proceed to introduce their evidence on the cause of action thereof and on the counts of the original complaint.

6. The trial was proceeded with on October 21, 1946. Eight witnesses testified on behalf of the plaintiff, six of whom had not testified in the previous Patent Office interference, including the welding expert, Mr. C. Weston Stewart, the mechanical expert, Mr. P. C. McNulty, the plating technician, Mr. A. H. Yaegers, and Mr. L. M. Ellebrecht.[5] (83 Fed. Sup. 178)

7. At the commencement of the suit Hugh C. Lord, attorney for defendants,[6] was under subpoena duces tecum to appear in Court and identify records in suit, and although his counsel promised on numerous occasions, [7] in response to the queries of the Court during the trial, to have him in Court, Mr. Lord never did appear, notwithstanding the fact that when he was served with the subpoena, as sworn to by the constable Hanson, he was in his office at the Lord Manufacturing Company at Erie, Pennsylvania, conducting business as usual. After the entry of

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[5] Defendants' counsel stated at the trial (Trans. p. 166) that "we cannot object to the expert testimony or to Mr. Ellebrecht or Mr. Yaegers."

[6] Mr. Lord, as attorney for defendants and of record in this suit, was found by the lower Court, in its opinion, to have motivated, participated in and consummated the complained-of fraud, which the Court characterized as "sordid" and "reprehensible in the extreme".

[7] Pages 130, 135, 182 and 183 of Trial Transcript, excerpts from which are printed on pages 5a-6a of Appellee's Appendix comprising part of the certified record filed herewith.

the Court's opinion of February 28, 1949, and at a hearing on the day of judgment, April 26, 1949, defendants' counsel endeavored to show, belatedly, that Mr. Lord was ill, although the constable's affidavit,[8] received by the Court of Appeals, indicates that Mr. Lord was eating a healthy lunch, including pie, when the subpoena was served and apparently was appearing daily at the offices of his company.

8. At the conclusion of plaintiff's case defendants indicated that they would not introduce any new evidence but elected to stand on the Patent Office record,[9] whereupon the Court specifically requested defendants to interpose any objections they had of record.[10] Aside from objections to plaintiff's Exhibits 50-100 and the pre-trial depositions of Mrs. Onck (Pl. Ex. 36), Brueggeman, Ellen Wood, Dashbach and Morris, (Pl. Ex. 137) counsel for defendants stated in open Court: "As to the other matter, we have no objection."[11]

9. On October 21, 1947 the lower Court granted plaintiff's aforesaid motion to amend the complaint of October 15, 1946 and defendants, on November 20, 1947, filed a supplemental answer and also filed a counterclaim for alleged infringement of the Jantz and other patents of defendants.

10. Plaintiff on December 8, 1947 moved to dismiss, under Rule 12, defendants' belated counterclaim and also moved to strike certain paragraphs from defendants' supplemental answer, which motions the lower Court heard in open Court on December 9, 1947.

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[8] Affidavit of Constable Hanson appears in certified Court of Appeals printed record filed herewith, pages 194-5.

[9] Lower Court trial transcript, page 235.

[10] Appellee's Appendix, page 3a.

[11] Appellee's Appendix, page 3a.

11. At the hearing on December 9, 1947, counsel of both parties, by and with the approval of the Court, reached a compromised understanding whereby plaintiff's motions were granted in part and plaintiff's motion to dismiss the counterclaim was held in abeyance until final disposition of the tried issues, and the Court signed an order, approved by both counsel, which, among other things, provided:

> **"3. It is further understood that both parties hereto have concluded their respective cases as to the original and amended complaint and that no further evidence or testimony will be adduced herein in connection with the causes of action of said original and amended complaints."** [12]

12. After the submission of extensive proposed findings of fact and conclusions of law by both parties, as well as additional dilatory motions by defendants, the lower Court, on February 28, 1949, rendered a fifty-two page opinion, (83 Fed. Supp. 178) deciding on all counts in favor of plaintiff, denying all of defendants' motions and specifically finding on the issue of fraud as follows:[13]

> "It is now clearly apparent that Jantz knew that the fact was that his Toggle Release Wringer (Exhibit 'O') was not completed and reduced to practice until sometime in March or April 1933. The concealment of material records and knowledge on the part of Herbsleb, Lord, and Kauffman; the use of records out of context, as in the use of the infringement notice of June 17, 1932, in the face of the remaining correspondence in their files giving an entirely different time element to that event, and the personal knowledge of

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[12] Quoted from lower Court's Opinion, reported 83 Fed. Supp. p. 178, Appellant's Appendix, pages 18a, 47a, 48a, 54a, 55a; also see separate printed record, filed herewith, of Lower and Appeal Court Opinions and Judgments.

[13] Quoted from lower Court's Opinion, reported 83 Fed. Supp. p. 178, Appellant's Appendix, pages 18a, 47a, 48a, 54a, 55a; also see separate printed record, filed herewith, of Lower and Appeal Court Opinions and Judgments.

Lord and Herbsleb concerning the same; the now quite evident pressure brought upon Jantz, an aged man of 82 rather than the age of 65 given in his deposition; the advantage taken of his straightened circumstances; the false picture given by the concealment of the true party in interest; the eliciting of statements in the depositions of witnesses which **in the light of their own personal knowledge they must have known were not true, present a sordid picture.**" (Emphasis Ours)

* * *

"SUMMARY

"**That there was a deliberate effort on the part of Lord, Herbsleb, and Kauffman** to step-up the Jantz date of invention and reduction to practice on behalf of Lovell Manufacturing Company **without regard to the truth thereof,** is apparent throughout these proceedings and certainly **must be characterized as fraud** in connection with the obtaining of a finding of priority in favor of Jantz and the subsequent issuance of a patent thereon.

"**While this conduct on the part of Lord, Herbsleb, and Kauffman was in my judgment reprehensible in the extreme,** I am constrained under the circumstances of the case to deny plaintiff's claim for damages on the ground of conspiracy. I do find as a fact, however, that such fraud was a major contributing factor in the award of priority to Jantz and the subsequent issuance of a patent on his application by the Patent Office; furthermore I also find as a fact that **the chief motivating forces throughout this entire build-up procedure were Lord and Herbsleb, both attorneys but neither one a defendant.**

"The action here was brought to determine the priority of the claims between the two parties. The proceedings continued over a long period of time and finally reached the point where all parties agreed that the 4915 and 4918 suits were finished business and an order was entered on December 9, 1947, confirming this understanding. In the light of this agreement and confirming order, **defendant cannot now by dilatory mo-**

tion be permitted to raise a question of which he was fully cognizant prior to the agreement and order, and which is not predicated on any newly discovered evidence." (Emphasis Ours)

13. After a further hearing in Open Court on April 26, 1949, judgment[14] was entered on that date in conformance with the Court's opinion of February 28, 1949.

14. Thereafter an appeal was taken by defendants to the Court of Appeals for the Third Circuit and was heard on December 8, 1949, at which time the Court ordered the parties to print all of the pleadings and to share the expense of the same.[15] However, due to the sudden decease thereafter of Judge O'Connell, a further hearing was had on January 5, 1950 which resulted in an opinion (179 Fed. 2d, P. 302) of January 10, 1950 by the Court of Appeals, dismissing the case for want of jurisdiction because the Lower Court had not, in its judgment, disposed of all the issues, including that of the counterclaim, as provided for in Rule 54(b).

15. After the filing, by the defendants, of motions to vacate and to add to the suit as a party, the Chamberlain Corporation, employer of Etten, the Lower Court, on March 8, 1950, [16] entered an order vacating its previous judgment of April 26, 1949 and ruling (under Rule 54(b)), among other things, as follows:

> "* * * **it is hereby certified that this Court has made this express determination that there is no just reason for delay in the entry of the following judgment as final on the issues raised in the complaint** and that the disposition of defendants' counterclaim for infringe-

[14] Printed in accompanying Record and also appearing at pages 56a-57a of Appellant's Printed Appendix.

[15] Such Printed Pleadings have been certified to by the Court of Appeals and are being filed herewith.

[16] Pages 5a-9a of Appellant's Printed Appendix. Also see printed volume, filed herewith, of judgments.

ment and **any undisposed of motions including defendants' motion for interrogatories in relation thereto should not delay the entry of the final judgment.** It is my opinion that **grave injustice would be done by requiring the determination of the issues raised by the complaint to await the outcome of any further and undisposed of matters in this cause.** Furthermore, all parties specifically agreed to close the proceedings as to the issues raised in the complaint as is set forth in the Order of this Court dated December 9, 1947, and filed December 16, 1947." (Emphasis Ours)

The Court, in its order, also adopted its previous judgment of April 26, 1949 and the opinion of March 2, 1949 in *haec verba* and supplemented its judgment by specifically finding that plaintiff had sustained its burden of proof on the cause of action alleging conspiracy, fraud, misrepresentation, and supression of evidence and by also denying defendants' motions on the ground that they were barred by defendants' laches and because no adequate reason had been given to justify the delay.

16. Thereupon defendants, the respondents herein, again appealed, and the Court of Appeals for the Third Circuit entered a judgment and supporting opinion[17] on September 29, 1950 on the basis of self-serving documents and motions presented by defendants after evidence was closed in the trial Court (which documents were not in evidence) and contrary to the findings of the District Court on the undisputed evidence of title, vacated the District Court's judgment in its entirety with costs against plaintiff and remanded the case for reconsideration on the question of title, conceding in its opinion that the Court below had jurisdiction at the time the suit was filed on March 1, 1944 but raising a question as to whether the Court below

[17] 87 U.S.P.Q. 35. Also included in printed volume of judgments and opinions.

had lost jurisdiction by reason of said documents and certain assignments made after the suit was instituted.

17. A. The action of the Court of Appeals in vacating the Lower Court's judgment in its entirety even as to the undisputed issue of conspiracy and fraud of respondents; B. the refusal of the Court of Appeals to acknowledge or heed the findings of the District Court made upon undisputed evidence **notwithstanding the Lower Court's certificate under Rule 54(b) that grave injustice would be done to delay further the proceedings to consider the issues, including that of title, belatedly raised by defendants;** C. the action of the Court of Appeals in considering documents not in evidence and presented after the stipulation of both parties that proofs were finally and conclusively closed; D. the failure of the Court of Appeals to avoid further protracting the litigation which has already been pending thirteen years; and E. the failure of the Court of Appeals to take cognizance of the Rules of Civil Procedure permitting the continuance of an action regardless of any transfer of interest, particularly after conceding that the jurisdiction existed at the time the suit was filed (Rule 25 (c) F.R.C.P.) —all form the crux of the situation here and are submitted as being in error.

Jurisdiction.

The judgment of the Court of Appeals was entered on September 29, 1950.

The jurisdiction of this Court is invoked under Section 1254(1), Title 28, United States Code Annotated.

On the question of fraud in the procurement of a patent, your petitioner relies on:

Hazel-Atlas Glass Co. v. *Hartford Empire Co.*, 322 U.S. 238.

Precision Instrument Manufacturing Co. et al v. *Automotive Maintenance Machinery Co.*, 324 U.S. 806.

On the question of review of suits under Section 4915 R.S. and Section 4918 R.S., your petitioner relies on:

Hoover Co. v. *Coe*, 325 U.S. 79.

Victor Talking Machine Co. v. *Brunswick-Balke-Collender Co.*, 273 U.S. 670, affirming 8 Fed. 2d 41 and 290 Fed. 571.

On the question of review of appellate court judgments to avoid further protracting the litigation, your petitioner relies on:

Spiller v. *Atchison, T. & S. F. Ry Co.*, 253 U.S. 117.

QUESTIONS.

1. Where a Lower Court of Equity, in **long perding patent**[18] **and fraud litigation,**

A. after a trial in open Court involving both factual and expert testimony,

B. enters judgment on all counts in favor of plaintiff,

C. together with exhaustive findings as to **highly reprehensible fraud,** suppression of evidence and conspiracy **by defendants and their attorneys,** and

D. the Court of Appeals on appeal of the defendants **after three appeal hearings, enters judgment vacating in its entirety the Lower Court's judgment with costs against the winning party plaintiff,**

was the Court of Appeals in error, and not acting in the public interest and consistent with the good order of society[19], in withholding relief to plaintiff, your petitioner[20], and by requiring the Lower Court to inquire further into irrelevant, technical questions of title, notwithstanding the fact that the Court of Appeals conceded in its opinion that the Court below had jurisdiction at the time the suit was filed?

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[18] The patent interference proceedings have been pending nearly thirteen years and the Court suit has been pending over seven years.

[19] Hazel-Atlas Glass Co. v. Hartford Empire Co., 322 U.S. 238 (p. 246). Precision Instrument Manufacturing Co. et al v. Automotive Maintenance Machinery Co., 324 U.S. 806 (p. 816).

[20] Notwithstanding Lower Court's certificate under Rule 54(b) that further delay to consider the title issues under 25(c) belatedly raised by defendants would result in a grave injustice.

2. Where in a suit in equity with counts under Sections 4915 R.S. and 4918 R.S. and **for damages for fraud,**

A. a Lower Court after hearing and considering undisputed new and expert testimony of plaintiff in open Court, renders an exhaustive decision on all counts in favor of plaintiff, including one on the merits of a priority issue as between adverse claimants to a patent, different from that reached in the Patent Office interference proceedings, and

B. the defendants for their case relied only on the Patent Office record,

was the Court of Appeals in error in its judgment (**with costs against plaintiff**) completely vacating and not affirming the Lower Court's judgment as to any of the three counts, in the utter absence of any showing of very obvious and exceptional error in the factual findings of the Lower Court?[21]

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[21] Graver Tank and Mfg. Co., Inc. et al v. Linde Air Products Co., 336 U.S. 271 (pp. 274-5).

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

The discretionary power of this Court to grant a writ of certiorari is invoked upon the following grounds, as set forth in Rule 38 of the Rules of this Court:

1. The highly "reprehensible" and "sordid" fraud, found by the trial court to have been perpetrated by the defendants and their attorneys, in the illegal procurement of the issuance of the Jantz letters patent, is of such far reaching social and economical consequence as to necessitate intervention, here, by this Court, in the interest of public welfare and good order of society[22], to the end of terminating further protraction of the litigation and the continued foisting on the public of such illegitimately procured patent monopoly.

2. The protracted action of the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision consistent with this Court's rulings in the case of **Hazel-Atlas Glass Co. v. Hartford Empire Co.**, 322, U.S. 238 (246) that **"the public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud."**

3. Litigation instituted under the Federal Statutes (R.S. 4915-4918), such as here involved, and questions of interpretation of such statutes have long been held by this Court to be matters of public policy; and intervention is here required to clarify the statutory law and put to an end further expensive protraction of this litigation.

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[22] Precision Instrument Manufacturing Co. et al v. Automotive Maintenance Machinery Co., 324 U.S. (p. 816).

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued to the United States Court of Appeals for the Third Circuit to the end that this case may be reviewed and determined by this Court; that the judgment of the Court of Appeals be reversed and that of the Lower Court be affirmed; and that petitioner be granted such other and further relief as may be proper.

Respectfully submitted,

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December 7, 1950.

IN THE

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OCTOBER TERM, 1950.

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vs.

WALTER L. KAUFFMAN II and LOVELL MANUFACTURING COMPANY,

Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinions of the Courts Below.

The original fifty-two page opinion of the District Court, written by Judge Follmer, is reported in 83 Fed. Supp. 178.

The opinion of the Court of Appeals dismissing the first appeal is reported at 179 F. 2d 302 and the second opinion of the Court of Appeals is reported at 87 U.S.P.Q. 35.

For the convenience of the Court, there is being filed herewith a printed volume containing these opinions together with the judgments entered in connection therewith.

Jurisdiction.

Reference is hereby made to the jurisdictional statement appearing in the accompanying petition, page 12.

Statement of the Case.

To avoid repetition, reference is made to the accompanying petition, pages 3-11, inclusive, for the essential facts of the case.

Specification of Errors.

Again to avoid repetition and prolixity, reference is made to the accompanying petition wherein is set forth the questions presented and the reasons relied on for the allowance of the writ; the Court of Appeals having erred in deciding the subject of such questions adversely to Plaintiff; and as more specifically set forth in Paragraph 17 of the Petition Summary.

Summary of Argument.

The argument will be based on the two questions presented in the petition, pages 13-14.

ARGUMENT.

Question 1.

The following quoted promulgations of this Court in the case of **Hazel-Atlas Glass Co. v. Hartford Empire Co.,** 322 U.S. 238, and the case of **Precision Instrument Manufacturing Company et al v. Automotive Maintenance Machinery Co.,** 324 U.S. 806, are so clearly applicable to the fraud aspects of this case that they can be very aptly employed herein:

Hazel-Atlas Glass Co. Case (p. 246):

> "But even if Hazel did not exercise the highest degree of diligence, Hartford's fraud cannot be condoned for that reason alone. **This matter does not concern only private parties. There are issues of great moment to the public in a patent suit * * *.** Furthermore, tampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. **It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society.** Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud." (Emphasis Ours).

Precision Instrument Case (p. 816):

> "* * * A patent by its very nature is affected with a public interest. As recognized by the Constitution, it is a special privilege designed to serve the public purpose of promoting the 'Progress of Science and Useful Arts'. At the same time, a patent is an exception to the general rule against monopolies and to

> the right to access to a free and open market. **The far-reaching social and economic consequences of a patent, therefore, give the public a paramount interest in seeing that patent monopolies spring from backgrounds free from fraud or other inequitable conduct and that such monopolies are kept within their legitimate scope. The facts of this case must accordingly be measured by both public and private standards of equity''.** (Emphasis Ours)

Actually, here the fraud aspects are of a more aggravated nature than in either of the foregoing cases, inasmuch as the Lower Court, on a specific fraud count, **characterized the fraud that had been practiced by the defendants and their attorneys, Mr. Lord and Mr. Herbsleb, as being "sordid" and "reprehensible in the extreme", and further held that the attorneys** themselves were the chief motivating forces. (See page 8 of Petition).

It is fortunate, from the standpoint of the legal profession, that seldom, if ever, do we encounter the perpetration of fraud and suppression of evidence such as was adjudicated by the Lower Court to have been unequivocally practiced by the defendants and their attorneys herein. The ferreting out and piecing together, step by step, of the facts as found by the Lower Court is, in itself, a herculean task and should not be complacently disregarded by an Appellate Court in favor of technical title questions belatedly injected into the litigation. **This is especially true where the alleged documents relied on in support of the technical questions are not even in evidence in the case and where the Lower Court has, under Rule 54(b), specifically certified that to delay the case to consider the belatedly raised issues,** especially in the utter absence of any showing at all why such readily available evidence was not produced sooner, **would result in grave injustice.** (See pages 10 and 11 of Petition).

The Court of Appeals in its judgment of September 29, 1950 vacating the Lower Court's judgment in its entirety with costs against the plaintiff-appellee, did so on an unwarranted inquiry into an irrelevant or collateral issue of change of title after filing of suit which obviously, from the standpoint of the public interest and good order of society, was subservient to the fundamental fraud issues at stake. In reality **the final judgment of the Court of Appeals,** here at issue, completely vacating the Lower Court's judgment, **is tantamount to holding that the Lower Court, on the basis of the evidence before it, did not have jurisdiction to render the decision that it did.**

This Court has said that where the public interests are involved a Court of Equity is not foreclosed from protecting those interests, even in the face of a technical defense as critical as that of **res adjudicata.** In this regard attention is directed to the case of **Mercoid v. Mid-Continent Investment Co., 320 U.S. 661,** wherein this Court at page 669 said:

> " * * * We do not stop to examine the premises on which the argument (of **res adjudicata) is based; for though we assume that they are correct, it does not follow that the doctrine of res adjudicata forecloses the defense which is tendered."**

Speaking further, the Court stated (at 670):

> "* * * 'Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved.' *Virginia Ry. Co.* v. *System Federation,* 300 U.S. 515, 552. * * *"

In this case the Court of Appeals had before it the entire record as well as very extensive arguments and briefs presented by the parties at **three separate appeal hearings** before the Court. To the end of precluding further protraction of this litigation, it is submitted that it was the

duty of the Court of Appeals to adjudicate the merits rather than to vacate the judgment on an irrelevant and collateral issue of title arising under Rule 25(c) of the Federal Rules of Civil Procedure.

Factually, the record here reveals that during the trial in open Court the defendants at no time raised such technical issue as to title, but, on the contrary, when the title papers or assignments recorded in the Patent Office (Plf. Exhs. 139-140, appearing at pages 13a and 16a of appellee's appendix) were offered in evidence showing title in plaintiff at the time of the filing of the suit, the defendants stated, "We have no objection." (See page 6 of Petition). In addition, the plaintiff, your petitioner here, testified in open Court that he was the applicant and that he was entitled to bring this litigation, as was so found by the Court of Appeals in its decision of September 29, 1950 (page 3 of opinion—Printed Appeal Record p. 212).

In the light of the evidence adduced, the Lower Court, in its opinion, with respect to the question of title, specifically found in finding of fact 14, as follows:

> "14. **At the time of the filing of this suit,** the aforesaid Jantz application, Serial No. 749,977 (now issued as Letters Patent No. 2,406,951) was assigned to and admittedly owned by defendant Lovell, and **each of the aforesaid Etten applications were owned by the plaintiff herein (Plf. Exhs. 139 and 140).**"

Long after the trial the defendants belatedly presented motions including title documents allegedly purporting to show that after this suit was instituted Mr. Etten had divested himself of his legal title by assigning his applications in suit to the Chamberlain Corporation under an alleged license from Etten. In response thereto plaintiff moved to strike such belated motions on the ground of laches. It was also pointed out to the Court that Rule 25(c) specifically provided that in the case of transfer of

interest the action may be continued by or against the original party, it being discretionary with the Court whether the person to whom the interest is transferred should be substituted or joined with the original party.

For the convenience of the Court and since the applicable rule is very short, it is quoted hereinbelow:

> "25(c). **Transfer of interest.** In case of any transfer of interest, **the action may be continued by or against the original party,** unless the Court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party. Service of the motion shall be made as provided in subdivision (a) of this rule." (Emphasis Ours)

The Lower Court, in its judgment, granted plaintiff's petition to strike so that the documents relied on by the defendants in their appeal were not in evidence in the case. In this respect the Lower Court held as follows:

> "That plaintiff's motion of January 9, 1948 to strike defendants' notice of December 30, 1947 together with all papers referred to therein and attached thereto is hereby granted and said notice and supporting papers and affidavits are hereby stricken from the record." (Judgment of April 26, 1949, appellant's 1st appendix, p. 57a. Repeated in second judgment of March 10, 1950, appellant's 2nd appeal appendix, p. 7a).

The Court of Appeals in its last opinion of September 29, 1950 remanded the case to the Lower Court for the purpose of receiving evidence as to these documents, although admitting that the Court below had jurisdiction at the time of the filing of the suit.

The Court of Appeals in its opinion has made three fundamental errors, namely:

(1) It has completely overlooked the fact that this suit was brought by the applicant who, regardless of any as-

signments by him, has a statutory right as an applicant to bring such litigation under Section 4915 R.S. and 4918 R.S.

(2) It is erroneously assumed that Rule 25(c) is purely procedural law and is not an expression of substantive law; and

(3) It has ignored entirely the fact that this suit also includes a fraud count which is not in any way affected by any question of title alluded to by the Court of Appeals in its opinion.

PLAINTIFF WAS PROPERLY ENTITLED AS AN APPLICANT FOR LETTERS PATENT TO MAINTAIN SUITS UNDER REVISED STATUTES AND COURT OF APPEALS ERRED IN VACATING JUDGMENT.

The history of Section 4915 R.S. is thoroughly set forth in the decision of this Court in the case of **Hoover v. Coe**, 325 U.S. 79. That case and the authorities cited in the footnote on page 88 clearly indicates that this Court will review a judgment of the Courts of Appeal involving a question of jurisdiction arising under this Section of the Statute.

As announced in **Hoover v. Coe** and the related cases therein referred to, an applicant is entitled, as a matter of right under Section 4915 R.S., to a trial **de novo** if he is dissatisfied with the decision of the Patent Office. It should be noted that this case arose prior to the October 5, 1939 amendment of Section 4915 R.S. Under the old practice, in a Patent Office interference the losing party had to appeal first to the Patent Office Board of Appeals before he could pursue his remedy under Section 4915, and that was the procedure followed by the party Etten herein.

As to the two interferences Nos. 75,433 and 76,987 here involved, as early as 1911 the courts have held that while

a proceeding under Section 4915 is an independent suit in equity, it is, notwithstanding, a part of the procedure of obtaining a patent. In that regard attention is directed to the case of **Wende v. Horine**, 191 Fed. 620, wherein the Federal District Court held that even though the inventor had assigned his legal title to an application for patent, a suit under Section 4915 can be maintained in his name as the statute expressly provides that the **applicant** is entitled to such relief.

Most of the questions of jurisdiction that have arisen in the past, under Section 4915, have had to do with suits instituted by assignees rather than by the applicant himself. Here there can be no question as to the plaintiff's right to maintain the suit as he is the applicant. (**Schmertz Wire Glass Co. v. Pittsburgh Plate Glass Co.**, 168 Fed. 73; **Colman v. American Warp Drawing Machine Co.**, 235 Fed. 531).

In the latter case the District Court of Massachusetts made it very plain that even though it might authorize the issuance of a patent under Section 4915 to the prevailing party, the Commissioner can, in the event of any change in title, issue it to an assignee, as the case may be, and stated at pages 533 and 534:

> "'The applicant' in the interference proceedings is the only party to whom section 4915 expressly gives the remedy by bill in equity, and on the defendant's allegations Field was the only applicant in the interference proceedings here involved. Field is nowhere made a party to the present suit. Under the Patent Acts of 1836, 1837 and 1839, the assignee to whom an applicant had transferred his rights after final refusal of a patent was held entitled to the statutory remedy by bill in equity in his own name. It was said that he was 'at least within the spirit', if not within the letter, of the statutory provision. *Gay* v. *Cornell*, 1 Blatch, 506, Fed. Cas. No. 5,280 (1849). But even if this defendant, under the somewhat different

provisions of the act of 1870, now Rev. St. 4915, might be regarded as the 'Applicant', and entitled to the statutory remedy in its own name independently of Field, it can hardly claim this position in view of its own allegations above referred to. Field, it would seem, might in any case bring the statutory bill in his own name as applicant, and maintain it in the absence of intervention by the defendant. *Wende* v. *Horine* (C.C.)-191 Fed. 620. Under equity rule 37 (198 Fed. xxviii, 115, C.C.A. xxviii), **it would also seem, Field could bring the bill in his own name without joining the defendant, even if it be true that the defendant is the real party in interest, because, as 'the applicant' he is the party expressly authorized by statute.** It would be difficult, in view of all the above, to call the independent suit in equity under section 4915 a cross-suit between the parties to the infringement suit, with which Field has no connection."

" * * * The relief obtainable, if any, by the defendant and Field, under section 4915, is a decree that Field, instead of the plaintiffs, is entitled to receive a patent for his invention as specified in his rejected application. Such a decree, when filed in the Patent Office, is to 'authorize' the issue of such a patent, but with its entry the power of this court in proceedings is exhausted. Such a patent would not necessarily be issued to the defendant. **Though it might be so issued, under Rev. St. 4895 (Comp. St. 1913, 9439), whether it should be issued to the defendant or to Field would be within the Commissioner's discretion.** See *Elliott-Fisher Co.* v. *Underwood Co.* (C.C.) 176 Fed. 372; *Thoma* v. *Perri* (D.C.) 205 Fed. 632." (Emphasis Ours)

Now in the present case, even assuming for purposes of argument, that the plaintiff, after this suit was instituted, assigned the legal title to his applications in suit, that in itself would not bar the suit, nor does it justify the Court of Appeals in completely vacating the judgment of the Lower Court with instructions to the Lower Court to in-

quire further into the chain of title of these Etten applications.

The Court of Appeals in its opinion of September 29, 1950, having found on page 12 that the Lower Court had jurisdiction, should have found that the requirements of Section 4915 were fully satisfied, especially since the plaintiff is the applicant and losing party in the interferences involved. In this regard the Court of Appeals could not have properly held that the Lower Court was without jurisdiction, especially since the Lower Court after hearing and considering the factual evidence and testimony of plaintiff entered finding of fact 14 (*supra*) holding that at the time of the filing of this suit plaintiff owned his applications in suit.

The practice as to Section 4918 R.S. is no different, since under that section **an interested party** may maintain the suit, and certainly it cannot be denied that an applicant is an interested party. The Court below acted entirely according to law in considering the evidence as to both of the suits or counts under these two sections of the Statute since evidence admitted under a suit brought under Section 4915 is admissible in a suit under Section 4918. In this respect attention is directed to the following quoted portion of the decision in the case of **Victor Talking Machine Co. v. Brunswick-Balke-Collender Co.**, 290 Fed. 565, 570:

> "In view of *Johnson* v. *Mueser, supra,* and like cases, I think a suit in equity under R.S. Sec. 4918, **between parties interested in interfering patents, is not different in character from a suit under R.S. Sec. 4915.** A suit under the latter section has been uniformly held to be an original, independent action, in which all questions in issue are tried *de novo* upon all competent evidence, new or old. *Butterworth* v. *Hoe,* 112 U.S. 50, 61, 5 Sup. Ct. 25, 28 L. Ed. 656; *In re Hien,* 166 U.S. 432, 17 Sup. Ct. 624, 41 L. Ed. 1066;

Courson v. *O'Connor* (C.C.A. 7) 227 Fed. 890, 892, 142 C.C.A. 414; *Gold* v. *Gold* (C.C.A. 7) 237 Fed. 84, 150 C.C.A. 286; *Curtiss Aeroplane & Motor Corporation* v. *Janin* (C.C.A. 2) 278 Fed. 454, 455. **Consequently evidence that would be admissible in a suit instituted under R.S. Sec. 4915 is admissible in a suit instituted under R.S. Sec. 4918, and so in this suit."** (Emphasis Ours)

The foregoing decision was **affirmed in 8 Fed. (2d) 41** and also by **the Supreme Court of the United States at 273 U.S. 670 per curiam.**

Certainly since the Lower Court found that the defendants had perpetrated a fraud in the prosecution of the Jantz application in the Patent Office interferences, it was not only proper but its duty, from the standpoint of public interest, to invalidate the patent issuing on such Jantz application. To hold otherwise results in the foisting on the public of a fraudulent monopoly.

From the foregoing it is apparent that the Court of Appeals erred when it vacated the Lower Court's judgment with instructions to the Lower Court to receive further evidence under Rule 25(c) with regard to any changes in title to the Etten applications.

RULE 25(c) AS APPLIED TO R.S. 4915 IS AN EXPRESSION OF SUBSTANTIVE LAW AND IS NOT MERELY PROCEDURAL, AS INDICATED BY THE COURT OF APPEALS IN ITS OPINION.

The Court of Appeals in its opinion (pages 12 and 13—Appeal R. p. 219-220) stated:

"It must be conceded that the Court below had jurisdiction of the parties and during one period, viz., from October 22, 1943 to March 1, 1944, may have had jurisdiction of the subject matter of the action based on R.S. Section 4915." (Emphasis Ours)

* * * *

"If the court below should find on remand that Etten lost or did not possess any cognizable legal interest in the R.S. Section 4915 action or in the R.S. Section 4918 action, that tribunal must determine whether or not Chamberlain Corporation may be added as a party-plaintiff to the suit or whether or not Chamberlain may be substituted as a party-plaintiff in place of Etten. This will involve, we think, **a determination of whether the provisions of Rule 25(c) are contrary to the substantive law** as set out in R.S. Section 4915 and whether the doctrine of **laches**, or any other principle of law or equity, would militate against the addition or substitution of Chamberlain Corporation as a party as sought by the litigants." (Emphasis Ours.)

"**The Court below should also consider whether or not the motions to add Chamberlain Corporation as a party-plaintiff or to substitute that company in lieu of Etten as a party-plaintiff were improvidently denied.**" (Emphasis Ours)

From the foregoing quotations and the general tenor of the entire opinion of the Court of Appeals, it is evident that this Court in vacating the judgment below did so on the erroneous assumption that it was incumbent upon the District Court to add or substitute for the plaintiff as a party in this suit plaintiff's assignee, the Chamberlain Corporation. The Court apparently did not consider that Rule 25(c), so far as actions under R.S. 4915 are concerned, expresses the long established prior practice of permitting the prosecution of the suit either in the name of the "applicant" or his assignee, or both, as substantively provided by statute; and that hence the Lower Couurt properly acted within its discretion in not adding to the suit or substituting for the plaintiff in the Chamberlain Corporation in accordance with that rule.

Since the adoption of the Rules of Civil Procedure, the Courts have, on numerous occasions, interpreted Rule

25(c) as not making it mandatory that a substitution be made in every case of a transfer of interest. In this respect one instance is the case of **McComb v. Row River Lumber Co.**, 177 F. (2d) 129, 130, wherein the Court of Appeals for the 9th Circuit, 1949, held as follows:

> "The Rules of Civil Procedure 'govern the procedure in the district courts of the United States', Rule 1. These rules are adopted by this court wherever applicable with respect to appeals in civil actions. **But it will be noted that under Rule 25(c) it is not mandatory that a substitution be made in every case of a transfer of interest.**
>
> "(3) Undoubtedly this court has the power to order a substitution, *Sumpter Lumber Co.* v. *Sound Timber Co.*, 9 Cir., 257 F. 408, 410, but this is a matter of discretion in this court. *Stepp* v. *McAdams*, 9 Cir., 88 Fed. 2d 925, 927. Where we have allowed a substitution, it has been in cases where the plaintiff below has transferred his interest in the subject matter of the action, which was to protect an interest in a res. *Sumpter Lumber Co.* v. *Sound Timber Co., supra* (quieting title to land); *Wire Tie Machinery Co.* v. *Pacific Box Corporation*, 9 Cir., 102 F. 2d 543, 545 (patent infringement suit).
>
> "On the other hand, where substitution is sought in this court for a defendant below even where the person sought to be substituted has agreed to pay the claim of the plaintiff, we have declined to allow a substitution. *Stepp* v. *McAdams, supra, Cf. Oklahoma Natural Gas Co.* v. *Oklahoma*, 273 U.S. 257, 47 S. Ct. 391, 71 L. Ed. 634."

Furthermore, notwithstanding this Rule, the courts have uniformly held that the question of substitution of plaintiff is a matter of discretion of the trial court and ordinarily a review on appeal of the exercise of that discretion is not permitted. *Chapman* v. *Barney*, 129 U.S. 677 (1889).

In **Schmertz Wire Glass Co. v. Pittsburg Plate Glass Co.**, 168 F. 73, at page 87, it was held that where a 4915

action was properly instituted, the Court did not lose jurisdiction by reason of the fact that the ownership of the interfering patent had been acquired by the adverse party by assignment after the action was commenced; and that moreover the Court had jurisdiction to decree the issuance of a patent in his favor. Thus, even under the substantive law of Section 4915 R.S. it is clear that an applicant can continue to prosecute his suit after assignment of his full right, title and interest in the patent application, *pendente lite*, without affecting the jurisdiction of the Court, and the provisions of Rule 25(c) are not contrary thereto but are in accord therewith. Other decisions consistent with the holding in the aforesaid *Schmertz* case are those appearing in the cases of **Colman v. Hathaway**, 285 Fed. 602; **McMullen v. Head**, 61 F. Supp. 799; **Boyer v. Rice**, 75 F. 2d 238.

As noted previously, the Court of Appeals in its decision held that at the commencement of the suit by the plaintiff the Lower Court had jurisdiction. It is well established that once a court of equity does properly derive jurisdiction, it is its duty to give complete relief, even to the extent of determining legal rights which would not otherwise come within the range of its authority. **Mendez v. Bowie** (C.A. Puerto Rico, 1941) 118 F. 2d 435; certiorari denied 314 U.S. 639.

This Court has also uniformly held that where the Federal Court has once properly acquired jurisdiction of an action, the Court does not lose jurisdiction merely because additional parties have to be or are added to the suit. **Phelps v. Oaks**, 117 U.S. 236; **Hardenberg v. Ray**, 151 U.S. 112.

Even in a declaratory suit for patent infringement, a transfer of the patents by the defendants **pendenti lite** was not interpreted by the Court as requiring substitution of parties under Rule 25(c). In **Hazeltine Corporation v.**

Kirkpatrick (C.A. 3) 165 F. 2d 683 (certiorari denied 334 U.S. 819) the Court said at page 685:

> "We turn, then, to the petitions of Hazeltine Research, Inc. That corporation avers that the district court lacked jurisdiction to enter the orders of June 16, 1947 joining it as a party defendant and it asks that Judge Kirkpatrick be directed to vacate the orders. The defendant, Hazeltine Corporation, had asserted that the patents in suit had been transferred **pendente lite** to this petitioner. The district court thereafter granted plaintiffs' motions to join this petitioner as a defendant in accordance with Civil Procedure Rule 25(c), the material portion of which is as follows: 'In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party.'
>
> "(4, 5) We see no want of jurisdiction in the district court to enter the orders of June 16, 1947. On the contrary, the situation here disclosed is just that which Rule 25(c) contemplates. But in so stating we desire to make it clear that we are not holding that the district court necessarily has the power to compel Hazeltine Research, Inc., as an additional defendant to appear, answer and litigate its rights in these suits. That will depend, if there is no voluntary appearance, upon whether the district court has venue jurisdiction over it under section 51 of the Judicial Code, the venue statute which is applicable to these suits. For Rule 25(c) is subject to the qualification imposed by Civil Procedure Rule 82 that it shall not be construed to extend the jurisdiction of the district courts or the venue of actions therein. Nor are we determining the extent, if at all, that Hazeltine Research, Inc., as assignee **pendente lite** or as wholly owned subsidiary of Hazeltine Corporation, will be benefited or bound by any judgments which in its absence may be entered for or against Hazeltine Corporation in these suits. That,

obviously, cannot be determined on these applications."

It has also been long recognized in text books that it is discretionary with the trial court whether a substitution of parties be made, except in cases of death or incompetency. For illustration, in Moore's Federal Practice, Volume 2, page 2431, we find this statement:

> "Since substitution does not affect the rights involved on a transfer of interest, it may under some circumstances be unnecessary. Indeed following the prior practice, the court may, in the exercise of its discretion, find it more convenient that the original party, who in this situation is still able to continue in the action, do so. In such a case the transferee will be bound by the judgment, even though not a party, for his rights are no better than his transferor."

It also appears from the Lower Court's second judgment of March 10, 1950 that it did, under Rule 25(c), pass on the propriety of including the Chamberlain Corporation as a party plaintiff and, within its discretion, decided not to do so at this time. In this respect the Court held:

> "That the motion of defendants to include the Chamberlain Corporation as a party plaintiff having been made by defendants subsequent to the agreement of both plaintiff and defendants that the proceedings were closed as to all issues raised in the complaint and which agreement was confirmed by Order of Court dated December 9, 1947, and no adequate reason having been given to justify the delay in making such motion, the defendants at this time are barred by their laches, and the motion is refused without prejudice to a renewal thereof at the proper time in connection with any other issues not herein adjudicated."

In the suit at bar, the Trial Court, having admittedly had jurisdiction at the time of the filing of the suit (as was so found by the Court of Appeals), acted properly

and within its discretion in not granting a motion to add or substitute for the plaintiff Chamberlain Corporation, assignee of the plaintiff. The Court, being a Court of Equity, and having properly acquired jurisdiction, was within its authority and indeed had the duty of adjudicating all issues relative to who was entitled to the patent, including those presented under Section 4918 R.S.; and this was especially true since the original complaint embodied a count for damages because of the perpetration of fraud in the prosecution of the defendants' Jantz application.

THE COURT OF APPEALS IN VACATING JUDGMENT OVERLOOKED ENTIRELY THE JUDGMENT ON PLAINTIFF'S FRAUD COUNT.

Under a count for fraud in an equity suit, a trial court has the grave responsibility and the authority to adjudicate all issues in connection therewith, especially where the public interests are at stake.

Hazel-Atlas Glass Co. v. *Hartford-Empire Co.*, 322 U.S. 238.

Precision Instrument Manufacturing Company et al v. *Automotive Maintenance Machinery Co.*, 324 U.S. 806.

In the case at bar, the Lower Court in its opinion delved exhaustively into the facts sustaining the fraud count and in both its original and subsequent judgments, specifically found in favor of plaintiff on such count. For illustration, in its amended judgment of March 8, 1950, paragraph 8 is distinctly in point:

> "8. That plaintiff has sustained its burden of proof as to the cause of action alleging conspiracy, fraud, misrepresentation and suppression of evidence and defendants are ordered and directed to pay costs and

reasonable counsel fees which shall be assessed and taxed as costs in an amount hereafter to be determined."

Now the questions of change in title raised in the Court of Appeals' opinion certainly have nothing to do with the right of plaintiff to maintain his suit for fraud. Yet the Court of Appeals even vacated the judgment in favor of plaintiff on the fraud count and **wrongfully assessed costs against the plaintiff.** (Printed Appeal Record p. 222.)

It is indeed a strange situation for a Court of Appeals to penalize a litigant who, in the public interest, has gone to great expense in exposing the perpetration of a fraud on the public in the procurement of a patent such as was practiced by the defendants and their attorneys in the prosecution of the Jantz application.

The costs which have been assessed against plaintiff by reason of the Court of Appeals' judgment are indeed of moment since the bill of costs presented by the appellants amounts to $2,167.32. (See Printed Appellate proceedings pages 223-4). Such costs even include those of the first appeal, which was dismissed, notwithstanding the express provisions of the Court of Appeals' Rule 35(1) to the contrary. This rule reads as follows:

"35(1) When Case Dismissed. In all cases where an appeal or petition shall be dismissed in this court, costs shall be allowed to the appellee or respondent, unless otherwise agreed by the parties or ordered by the court, except where the dismissal shall be for want of jurisdiction, when only the costs incident to the motion to dismiss shall be allowed."

It should be noted that in the first judgment of the Court of Appeals dismissing the appeal no assessment of costs was made (Appeal Record p. 171).

Also Rule 35 of that Court expressly provides that costs may be assessed when there is a reversal. There was no reversal here and yet notwithstanding the fact that the foregoing matters were called to the attention of the Court of Appeals in "Appellee's Objection to Appellants' Bill of Costs", the Court of Appeals nevertheless entered an order dated October 19, 1950 overruling such objections (See printed appellate proceedings pages 224-5).

A careful reading of the opinion of the Court of Appeals, dated September 29, 1950, fails to reveal any reason whatsoever for that court vacating the judgment of the Lower Court on the fraud count or as to why the plaintiff-appellee should be assessed all of the costs of the appeals of the defendants-appellants. Even assuming for purposes of argument, and which is by no means admitted by petitioner, that under the prevailing law the Court of Appeals could require the Lower Court to inquire further into the question of title with regard to the counts under sections 4915 R.S. and 4918 R.S. of the revised statutes, that still would not have justified vacating the judgment on the fraud count. Therefore, it would appear that the Court of Appeals has exceeded its authority in vacating such judgment on the fraud count and that your petitioner has been wrongfully deprived of his constitutional rights.

QUESTION 2.

IN THE FACE OF THE UNDISPUTED FACTUAL FINDINGS OF THE LOWER COURT AND ESPECIALLY THOSE RELATING TO THE HIGHLY REPREHENSIBLE FRAUD COMMITTED BY DEFENDANTS AND THEIR ATTORNEYS THE COURT OF APPEALS SHOULD HAVE AFFIRMED THE JUDGMENT OF THE LOWER COURT ON THE MERITS OF THE CONTROVERSY.

At the outset your petitioner desires to make it clear that the defendants, during the trial, made no effort to refute by testimony, or other evidence, the testimony and evidence adduced by plaintiff in open court during the trial de novo. On the contrary, the defendants elected to rely on the Patent Office record for their case.

If the defendants had any defense to the fraud, which the Lower Court has so forcibly found was practiced by the defendants and their attorney Mr. Lord, they could have called Mr. Lord as a witness on their behalf. On the contrary, the defendants frustrated every effort of the Lower Court and plaintiff to get Mr. Lord to appear in court as a witness, even though Mr. Lord was under subpoena of the court to appear as a witness.

Quoting from pages 5a and 6a of appellee's appendix we are confronted with the following very interesting excerpts from the trial before the Lower Court:

"Excerpts From Pages 130, 135, 182 and 183 of Trial Transcript

Page 130:

Mr. Hammer: They are not in court. Mr. Lord is ill and will not be in today; he can be in tomorrow.

Mr. Meroni: He will be in tomorrow?

Mr. Hammer: **He can be in tomorrow.**

Mr. Meroni: **Tomorrow morning?**

Mr. Hammer: It is pretty difficult for him to get in before eleven o'clock.

Mr. Meroni: We are glad to accommodate Mr. Lord. We understand he was engaged in a very heavy trial in—Washington, I believe. It was last week. And we don't want to place any undue burdens on him; but we would like to get these records, if they are available, or say so, at least. (Emphasis ours.)

Page 135:

Mr. Meroni: Well, they were suppressed in your files.

Mr. Hammer: They weren't even used.

Mr. Meroni: They were suppressed, and then when we asked for them before they weren't produced.

Mr. Hammer: I wouldn't say that a thing of that nature was suppressed. I have often made more than one preliminary statement.

The Court: **You say Mr. Lord will be in tomorrow?**

Mr. Hammer: **He will be in tomorrow.**

The Court: **All right, proceed.** (Emphasis Ours)

Pages 182 and 183:

Mr. Meroni: Your Honor, I had expected to have Mr. Lord available this afternoon, and Miss Ott. Apparently they are not going to be in until the morning. Under the circumstances, we can do either of two things, within the discretion of the Court; we can proceed to put some of these things in evidence, which is going to be quite a job, or we can do that tomorrow; or I could use the time to advantage in starting to offer in evidence some of these depositions and things, which is going to be quite a laborious task.

The Court: Yes, I think they ought to go in.

Mr. Meroni: Is that agreeable to Your Honor?

The Court: **Yes. As I understand it, the only thing left is Mr. Lord's appearance, which we can be assured will be available at eleven in the morning?**

Mr. Hammer: **Yes, I think so.** And Miss Ott is the other witness; she will be here when court convenes." (Emphasis ours.)

It is easy to understand why Mr. Lord never did appear in Court in response to the subpoena since if he had, his testimony would have sustained and added force to, rather than negatived in any way, the findings of the Lower Court as to the wrongful acts perpetrated by Mr. Lord on behalf of the defendants.

Belatedly, after the entry of the Lower Court's original opinion and at a hearing before the trial Judge on April 26, 1949, Mr. Lord's associate counsel in the case, Mr. Hammar, endeavored to show to the Court that Mr. Lord had been ill.

Quoting from the transcript of the court proceedings of April 26, 1949, certified to by the Court of Appeals in this proceeding, we find this statement: (Printed Appeal Record pages 202-3)

> "Mr. Hammar: There is one other matter that I would like to speak to the Court about. **It is possible to read Your Honor's opinion and to get the impression that at the time of the trial H. C. Lord was perfectly able-bodied, just standing outside the courtroom thumbing his nose at the court, and that when I represented to the Court he was unable to testify I was just making a frivolous excuse.** Now, that is not the case and wasn't the case at the time of the trial. And Mr. Lord is in court today. And while his health is probably better today than it was two and one-half years ago, I don't know that even today the doctor would allow him to testify.
>
> The Court: I think for your own sake and for the sake of Mr. Lord, Mr. Hammar, at the time it would have been very helpful if there would have been the customary doctor's certificate. **In other words, as I recall it, the promise was made from day to day that Mr. Lord would appear, and it was a matter of such very—I thought of such very great importance to Mr. Lord,** that even though he had been on the broad of his back and under the care of a day and a night nurse, it seems to me the doctor should have certified that. It

put you under a very severe handicap. I wasn't criticizing you. What you said I don't question for a minute; it was understood that that is what Mr. Lord would do. But Mr. Lord did not do that, and he did not—the promise was made that he would appear. He didn't appear. And there was no doctor's certificate to take his place.

Mr. Hammar: Nothing except my statement, which was unchallenged.

The Court: Unfortunately, in our procedure, a doctor's certificate—you and I are not doctors.

Mr. Hammar: Well, I was reporting what the doctor reported to me, that is all.

The Court: Well, the doctor should have reported to the Court. It gave the impression you were reporting what Mr. Lord said to you, not the doctor.

Mr. Hammar: No, that was not the representation." (Emphasis ours.)

On the appeal the defendants-appellants offered as justification for their failure to offer any evidence refuting that of plaintiff, or to produce Mr. Lord in response to the subpoena, the argument that Mr. Lord was ill at the time of the issuance of the subpoena.

In order to meet this new showing the plaintiff-appellee tendered to the Court of Appeals an affidavit of the constable, George M. Hanson, who had served the subpoena on Mr. Lord on October 21, 1946, which affidavit was ordered entered in the case by the Court of Appeals and a certified copy of which has been filed with the record accompanying this petition. In view of the importance of this affidavit with regard to the factual findings of the trial court and lated defense, it is quoted verbatim hereinbelow: (Printed Appeal Record pages 194-5)

"AFFIDAVIT OF GEORGE M. HANSON

STATE OF PENNSYLVANIA)
COUNTY OF ERIE) ss

GEORGE M. HANSON being duly sworn according to law deposes and says that he is the Constable of the Third Ward of the City of Erie, Pennsylvania and duly elected as such by the voters of said Ward. That on October 21, 1946 I made an affidavit containing true facts, the body of which follows:

> 'GEORGE M. HANSON being duly sworn deposes and says that he is a Constable of the City of Erie, Pennsylvania; that he is a person who is not a party to the above entitled action, and that he is not less than 18 years of age; that he served the within Subpoena Duces Tecum on H. C. Lord, personally, on October 21, 1946, at 11:55 A.M., by handing to Mr. H. C. Lord, personally, a true copy thereof.'

At the time I made the above service, as above recited, of the said Subpoena Duces Tecum, **Mr. H. C. Lord was present in his office of an Officer of Lord Manufacturing Company** at its plant at 1635 West 12th Street, Erie, Pennsylvania, and that **at that time Mr. Lord was sitting at his desk and was then eating his lunch at the plant, specifically a piece of pie.**

That your Deponent on June 5, 1950, went to the plant of the Lord Manufacturing Company at 1635 West 12th Street, Erie, Pennsylvania, and there saw Mr. H. C. Lord leave the plant at 12:20 noon on June 5, 1950 in an automobile which Deponent followed east on West 12th Street to Chestnut Street, north on Chestnut Street to West Eighth Street, and east on West Eighth Street to 233 West 8th Street, Erie, Pennsylvania. While the said Mr. H. C. Lord was in the office at 233 West 8th Street, being Dr. Tredway's office, Deponent, who knows the chauffeur for Mr. Lord, sauntered up to the chauffeur and stood with the said chauf-

feur on the sidewalk to have a friendly chat, and Deponent asked the chauffeur 'How is he?' (meaning Mr. Lord). The chauffeur said 'Not too good.' Deponent then asked the said chauffeur 'What will he (referring to Mr. Lord) do after seeing the Doctor?' The chauffeur answered as follows—'Oh, he will go back to the plant (meaning the plant of the Lord Manufacturing Company). I will take him back and then his wife will take him home because this is my day off.' In a further part of the conversation the chauffeur for Mr. Lord further stated **'Yes, he** (meaning Mr. H. C. Lord) **goes to the plant** (meaning Lord Manufacturing Company) **every day.'** (Emphasis ours)

GEO. M. HANSON

Sworn to and subscribed before
me this 6th day of June, 1950.
(SEAL) KATHRYN YOUNG
Kathryn Young, Notary Public
My Commission expires March 10, 1953''

From the foregoing, it is clear why the defendants elected to stand on their Patent Office record rather than to make any effort to refute any of the evidence adduced by plaintiff. It is also clear that since defendants have offered no evidence refuting the factual and expert witnesses who testified on behalf of the plaintiff in open Court, there is no case presented by defendants which would in any way support a reversal of the factual findings of the Lower Court on the merits of this suit. Especially is this true since the factual findings of the Lower Court are so intimately interwoven with the fraud and suppression of evidence practiced by the defendants and their attorneys.

In the light of these facts, there was nothing before the Court of Appeals on which that Court could have properly reversed the Lower Court's judgment and still followed the mandate of this court in such circumstances as announced in the case of **Graver Tank and Mfg. Co., Inc. et al v. Linde**

Air Products Co., 336 U.S. 271, decided February 28, 1949, wherein it was held (pp. 274-275):

> "Rule 52(a) of the Federal Rules of Civil Procedure, provides in part: '**Findings of Fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.' To no type of case is this last clause more appropriately applicable than to the one before us, where the evidence is largely the testimony of experts as to which a trial court may be enlightened by scientific demonstrations.**"
>
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> "The rule requires that an appellate court make allowance for the advantages possessed by the trial court in appraising the significance of conflicting testimony and reverse only 'clearly erroneous' findings. These are manifestly supported by substantial evidence and the Court of Appeals found them supported by the weight of the evidence—indeed found the evidence to warrant support of the patent even in matters not found by the trial court. A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below **in the absence of a very obvious and exceptional showing of error.** *Goodyear Tire & Rubber Co.* v. *Ray-O-Vac.*, 321 U.S. 275; *District of Columbia* v. *Pace*, 320 U.S. 698; *Williams Mfg. Co.* v. *United Shoe Machinery Corp.*, 316 U.S. 364; *Baker* v. *Schofield*, 243 U.S. 114, 118." (Emphasis ours.)

The Court of Appeals therefore erred when it did not comply with the promulgations of this court and more particularly in not affirming the Lower Court's judgment rather than vacating it in its entirety.

Under the circumstances of this case there were no facts of record, especially in the light of the exhaustive and thorough opinion of the Lower Court, that could have afforded

any basis for the Court of Appeals to reverse the Lower Court. This is evident since the Court of Appeals did not, in its judgment with costs against plaintiff, reverse the Lower Court's judgment. If there had been a basis for reversing, the Court of Appeals should have reversed after three appeal hearings rather than have vacated the judgment and remanded the case for further collateral proceedings relative to title. It is certainly not consistent with the maxims of equity for a Court of Appeals to protract litigation by putting the parties to the additional expense of adducing evidence if the decision is one which the Court can affirm or reverse. **Spiller v. Atchison, Topeka & Santa Fe Railway Company**, 253 U.S. 117.

The Court in the *Spiller* case, *supra*, announced the sound and equitable principle that it would entertain a writ of certiorari to avoid further protraction of the litigation. **In the present situation there have already been three appeal hearings and the situation is further aggravated by the fact that your petitioner's patent, on which a reissue application has been pending since 1937, will expire in 1953.** Through no fault of your petitioner, his application for reissue has been wrongfully held up by the fraudulent interference proceedings conducted in the Patent Office by the defendants and which proceedings culminated in the present court litigation instituted over seven years ago. To remand this case at this late date for additional evidence on the question of title, as was done by the Court of Appeals, results in irreparable and grave injury to your petitioner, **such as the**

Lower Court alluded to when it certified, under Rule 54(b), that to delay further these proceedings would occasion grave injustice.

It is therefore urged that this petition be granted to the end that justice will be done and further protraction of the proceedings will be avoided.

Respectfully submitted,

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